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No. 08-694

Supreme Court, U.S.
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In The Supreme Court of the United States

FEDERAL TRADE COMMISSION,

Petitioner,

v.

RAMBUS INCORPORATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF ADVANCED MEDIA WORKFLOW ASSOCIATION (AMWA); CONSUMER ELECTRONICS ASSOCIATION (CEA); GLOBALPLATFORM INC.; IMS GLOBAL LEARNING CONSORTIUM, INC. (IMS); INTERNATIONAL IMAGING INDUSTRY ASSOCIATION, INC. (I3A); IPC, ASSOCIATION CONNECTING ELECTRONICS INDUSTRIES; LINUX FOUNDATION; MIDI MANUFACTURES ASSOCIATION; MOBILE PRINTING AND IMAGING CONSORTIUM, INC.; OPEN GEOSPATIAL CONSORTIUM, INC. (OGC); OPENSAF FOUNDATION; ORGANIZATION FOR THE ADVANCEMENT OF STRUCTURED INFORMATION STANDARDS (OASIS); PICMG-PCI INDUSTRIAL COMPUTER MANUFACTURERS GROUP, INC. (PICMG); SOCIETY OF MOTION PICTURE AND TELEVISION ENGINEERS (SMPTE); THE OPEN GROUP (TOG); THE SOFTWARE DEFINED RADIO FORUM, INC.; VIDEO ELECTRONICS STANDARDS ASSOCIATION (VESA); VMEBUS INTERNATIONAL TRADE ASSOCIATION (VITA); XBRL INTERNATIONAL, INC.

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INTEREST OF AMICI CURIAE[1]

Each *amicus curiae* participates in the global process of standard setting, a time-honored process of great benefit to society. There are hundreds of standard setting organizations (SSOs) in the United States alone, creating and maintaining tens of thousands of technical, safety and other standards.

Amici curiae represent a broad range of SSOs that participate in the standard setting process, and each is greatly concerned by the adverse effects that it anticipates will result from the application of the United States Circuit Court of Appeals for the District of Columbia Circuit's decision in *Federal Trade Commission v. Rambus Incorporated*, 522 F.3d 456 (D.C. Cir. 2008). Those effects will reach virtually all aspects of modern society, commerce, education and government, because all of these interests rely heavily upon the efficient development and broad adoption of standards by the private sector.

The pervasiveness of standards, and of the potential reach of the decision on petition, is indicated by the range of focus of the *amici curiae*

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[1] The following statement is made in accordance with Sup. Ct. R. 37.6: No part of this brief was authored by counsel for any party and no monetary contributions were made by any person or entity for the preparation or submission of this brief, other than printing fees contributed by certain of the *amici curiae*. It has been filed on a *pro bono* basis by Gesmer Updegrove LLP, which represents many standard setting and promotional SSOs on an ongoing basis, including thirteen *amici curiae*. Counsel of Record has been notified within 10 days. Letters of consent from both parties have been filed with the Clerk of this Court.

that have joined in this brief. They include SSOs that develop standards or support standards development in sectors as diverse as defense, consumer electronics, photography, on-line learning, geospatial information, credit "smart" cards and a broad array of computer system products and services.

Amici curiae have a combined membership *of more than 13,300* (without adjustment for overlapping memberships), including both Fortune 100 corporations and small privately held companies; Federal, state and municipal agencies; universities; and other non-profit entities. *Amici curiae* include both types of organizations which are vital to standard setting in the United States today: those SSOs that have been accredited as standards development organizations (SDOs) by the American National Standards Institute (ANSI), and those that have been formed to create standards in broad or narrow technical areas, but have not sought ANSI accreditation. The latter type of organization is generally referred to as a "consortium." The standards that consortia develop are also implemented globally. More specifically, a*mici curiae* are:

- **SDOs**: Consumer Electronics Association, Inc. (CEA); International Imaging Industry Association, Inc. (i3A); IPC, Association Connecting Electronics Industries; Society of Motion Picture Engineers (SMPTE); VMEBus International Trade Association (VITA). *Collectively, this category of amici curiae represents more than 10,550 members*;

- **Consortia**: Advanced Media Workflow Association (AMWA); GlobalPlatform Inc. (GPI); IMS Global Learning Consortium, Inc. (IMS); Linux Foundation; MIDI Manufacturers Association; Mobile Imaging and Printing Consortium, Inc.; Open Geospatial Consortium, Inc. (OGC); OpenSAF Foundation; Organization for the Advancement of Structured Information Standards (Oasis); PICMIG-PCI Industrial Computer Manufacturers Group, Inc. (PICMG); The Open Group (TOG); The Software Defined Radio Forum, Inc.; Video Electronics Standards Association (VESA); and XBRL International, Inc. *Collectively, this category of amici curiae represents more than 2,750 members.*

The members of the *amici curiae* organizations, and tens of thousands of others like them, participate in the development of standards voluntarily and at significant cost in terms of dollars and human resources. At the heart of the decision to join an SSO is the expectation that the benefits derived from participation will exceed the risks and costs. Factors that make participation seem more burdensome tend to discourage participation, with attendant damage to the best interests of consumers and national competitiveness in the global marketplace. *Amici curiae* believe that the impact of the Circuit Court's decision will, for the reasons described below, have just such a discouraging effect.

It is a fundamental goal of each *amicus curiae* to participate in the development of "open"

standards, *i.e.*, standards that are available to all industry participants and that are not subject to unreasonable licensing terms. A cornerstone of any SSO intellectual property rights (IPR) policy is a section that addresses timely disclosure of relevant member-owned patent claims. Absent a reasonable expectation that a license to necessary patent claims will be available on licensing terms that are at minimum reasonable and non-discriminatory (RAND), members and non-members of SSOs will be unlikely to implement the standards that an SSO develops. The existence, and enforceability, of an effective IPR policy is therefore of paramount importance to the viability of every SSO.

Each *amicus curiae* in consequence has a strong interest in the development of sound law supporting enforcement of the obligations undertaken by members under SSO IPR policies. It is of critical importance to *amici curiae* that SSOs be able to rely on the courts and regulators to reliably and consistently interpret and enforce the IPR policies that SSOs adopt. *Amici curiae* believe that the failure of the Circuit Court to affirm the decision of the Federal Trade Commission (FTC) in the case under review will: (a) encourage standard setting participants to subvert the standards process; (b) discourage participation in SSOs, because potential participants will fear that they have more to lose than to gain by doing so; and (c) discourage early adoption of standards, because potential adopters will fear falling victim to "patent ambush," thereby slowing adoption of standards vital to areas as varied and vital as national defense, health, finance,

E-Government, communications and, indeed, every facet of our modern networked world.

SUMMARY OF THE ARGUMENT

The purpose of this amicus brief is not to make legal arguments, but to acquaint the Court with information supporting a decision by the Court to allocate its limited time to consideration of the legal questions at issue. In brief, *amici curiae* wish the Court to understand the increasing dependency of all aspects of society, commerce and government on standards, and the fragility of the process by which such standards are developed. *Amici curiae* believe that the type of conduct that the FTC found Rambus Incorporated (Rambus) to have engaged in, if allowed to go unredressed, would severely undermine and jeopardize the continued existence of that fragile process.

Standards are vital to government procurement, national competitiveness, and the efficiency and safety of society. Standards are created by voluntary, self-governing organizations that have no effective enforcement power to police the conduct of their members. In the information and communications (ICT) sector, the implementation of standards often results in the infringement of the patents of members and/or non-members. If the owners of these patent claims are only willing to license their claims selectively, or on unreasonable or discriminatory terms, then severe consequences will follow, including unreasonable costs to end-users, unfair discrimination against individual industry participants, and often the

complete failure of the standard in question. While such a result cannot easily be avoided in the case of a patent claim owned by a non-participant in the standard setting process, it would be highly inequitable for a patent owner to deceptively exploit its participation in an SSO to ensure such a result for its own benefit.

The value and importance of standards in the modern world is profound. As an example, the Department of Commerce concluded in 2004 that standards affect an estimated 80 percent of world commodity trade. U.S. Department of Commerce, *Standards and Competitiveness – Coordinating for Results* 1 (May 2004). In the ICT sector, the role of standards is particularly crucial, as vital infrastructural elements such as telecommunications, the Internet and the Web literally cannot exist without common agreement on, and universal implementation of, enabling protocols and other standards.

Moreover, private sector standards are often incorporated by reference into laws. But unlike public laws and regulations, standards are developed within a process that is not only self-regulating, but also largely unsupervised, except by those that directly participate. As a result, the success or failure of private sector standards development is highly dependent upon trust. If those that participate conclude that abusing the system is too easy to accomplish, and that such abuse is too lightly punished if discovered, then the entire system can find itself in danger of collapse, because the risks of participation and adoption of standards become

greater than the benefits to be gained. Were such a collapse to occur, virtually no aspect of society would be immune from the consequences.

More specifically, *amici curiae* wish to acquaint the Court with the following facts, as developed in greater detail in the arguments that follow:

1. Interoperability standards and other technical specifications play a vital and essential role in all aspects of modern society, commerce, government, and indeed, virtually every other aspect of our modern, networked world. With the increasing utilization of the Internet to support and enable finance, emergency response, homeland security, defense, healthcare, government services, education, communications, entertainment and much more, the efficient development and ongoing maintenance of hundreds of new ICT standards each year is becoming especially critical.

2. In enacting the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub. L. No. 104-113, 110 Stat. 775 (1996), Congress instructed each Federal agency to utilize standards created by SSOs in preference to "government unique" standards to the extent "practicable." In so doing, Congress deferred to the private sector to supply the tens of thousands of standards upon which the operations of government, and the implementation of its policies, must rely. In contrast to the government-supported process that is followed in many other nations, the United States depends upon representatives of industry, academia,

consumers and government to participate, at their own cost, in hundreds of non-profit SSOs to develop standards for the good of all.

3. Since the enactment of the NTTAA, government has become far more dependent upon standards to achieve its goals. Examples of current top-level policy areas that will be heavily dependent upon the rapid development of essential ICT and other standards include homeland security, electronic records for healthcare, E-Government and global warming.

4. SSOs adopt IPR policies that are intended to identify patent claims that would be "necessarily infringed" by an implementation of a standard under development, and to ensure that such "necessary claims" will be made available to all would-be implementers under at least RAND terms. Absent such knowledge and commitments, a patent owner may gain a degree of monopoly power over the implementation of a standard that can be greatly abused, to the detriment of consumers.

5. The standards development process relies heavily on a presumption of trust, and specifically on the assumption that members will honor their obligations under IPR policies. If that trust can be violated with impunity, then there is more for participants to lose than to gain by participating, and the very existence of the standards development infrastructure can become in danger of collapse.

6. Due to budget constraints and other concerns, SSOs are not capable of enforcing their rules in court. Because of the great cost of patent infringement litigation, it is extremely expensive for SSO members, and others that adopt standards, to defend themselves when IPR policy rules are violated.

7. SSOs, their members, those that adopt standards, and those that rely upon the standards they produce, therefore need to be able to rely on the courts to defend, and regulators to robustly enforce, their interests when standards development participants betray their duties of trust and violate IPR policy rules.

8. If the decision of the Circuit Court stands, then the integrity and viability of the standards development process will be endangered, at great cost to society, to the national interest, and to those that have made the substantial investment in time and money, and undertaken the business risk, to participate in good faith in the development of standards.

The antitrust laws are particularly important to preserving the integrity of the standards development process. Unlike contract and fraud remedies available under state laws, the antitrust laws are national in scope, and therefore provide greater predictability of result. They also permit both public (via the regulators) and private (by aggrieved parties) action, and are specifically constructed to protect competition. If the courts decline to enforce the integrity of standard setting

when such laws are violated, then the option of "gaming" the system will become more attractive to SSO members. As a result, additional litigation will reach federal and civil courts, discouraging companies from adopting the standards in question, and over-burdening those courts.

Given the rapid pace of innovation in standards-dependent areas such as the technology and telecommunications sectors and the increasing dependence of the world on the products of such innovation, *amici curiae* strongly support granting *certiorari* in this case.

ARGUMENT

I. The Viability of the Private Sector Standards Development Process is Vital to the National Interest

A. Standards are Essential to Almost All Aspects of Modern Life

A standard is required any time two or more people need to agree to do something in the same way -- whether it be setting the distance between two railroad rails, the gauge of a pipe fitting, or the technical characteristics of a computer modem. Absent such agreement, one could ride one train only to the end of its owner's tracks before having to switch to the train owned by the next carrier; one could only purchase plumbing products from a single vendor for a given project; and one could exchange electronic data only with a remote source known to have the same modem. Multiply this reality

1,000,000 times, and one begins to form a picture of the vital importance of standards.

Standards underlie almost all aspects of modern life. They are essential to protect security, safety and health. For example, SSOs set standards for building codes, fire safety codes and equipment specifications for diverse types of emergency responder and Homeland Security equipment. SSO standards also enable and drive technological advancement and innovation, keeping our domestic infrastructure strong and our economy competitive. Fault intolerant areas such as finance, defense, aerospace and telecommunications depend on rigorous adherence to SSO standards-based specifications, tools, processes and certifications.

Economically, it is well recognized that "standardization has significant consumer benefits in many markets." Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889, 1896 (2002). Standard setting serves to "increase price competition," "increase compatibility and interoperability, allowing new suppliers to compete," and "increase the use of a particular technology, giving the installed base enhanced economic and functional value." David A. Balto, *Standard Setting in the 21st Century Network Economy*, The Computer and Internet Lawyer, June 1, 2001, at 3. Indeed, in the absence of appropriate standards in a patent-rich environment, only a single vendor and such licensees as it chose to favor could offer a new technology, resulting either in the failure of the technology to become widely adopted, or in the

development of an inefficient monopoly in the IPR owner for the life of the involved patents.

Out of necessity, the modern world has become increasingly dependent upon the voluntary consensus process that creates standards. The result is a *global standard setting infrastructure* that is as extensive as it is invisible to those not directly involved. This infrastructure includes the official national standard setting organizations of the 157 countries that today comprise the membership of the International Organization for Standardization (ISO), together participating in 3,093 separate technical committees, subcommittees and working groups. ISO, *ISO In Figures* (December 31, 2007), *available at* http://www.iso.org/iso/about/iso_in_figures.htm. It is estimated that these and other national organizations maintain an incredible 780,000 (or more) official, nationally adopted standards. NIST, *Profiles of National Standards-Related Activities,* Spec. Pub. 912 (Robert B. Toth, ed., Apr. 1997). Consortia create thousands more standards that also achieve national or global adoption, particularly in the ICT industries. As a result, standards represent essential underpinnings to the functioning of the entire modern world. Any action that impedes the process of creating or adopting these standards will also undercut the institutions that rely on them to function. Given our reliance on these institutions, such actions will necessarily and adversely impact a bewildering array of aspects of modern life.

B. Government has Deferred to the Private Sector for Fulfillment of Government's Standards Development Needs

The Federal government has increasingly recognized that standards created through the voluntary consensus process are essential to its own efficient and cost-effective functioning. Historically, the government preferentially used "government unique" standards in much of its purchasing, which often served to limit the number of bidding vendors and resulted in higher purchasing costs. As a result, Congress enacted the NTTAA in 1996, which requires Federal agencies to use non-government unique standards whenever possible, but to actively participate in the activities of SSOs. The most important Federal agencies in the United States use hundreds, and even thousands, of SSO maintained standards, and are completing the task mandated by the NTTAA of substituting SSO and other non-government standards for pre-existing government and agency-specific standards. In 1998, the Office of Management and Budget (OMB) updated its Circular A-119 to provide additional guidance to the Federal agencies on implementing such standards. Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, Circular A-119, 63 Fed. Reg. 8545, 8546, 8554-55 (Feb. 10, 1998).

Since the enactment of the NTTAA, the Federal government has continued to take actions to facilitate standard setting by SSOs generally. In 2002, the Federal Trade Commission and the

Department of Justice held joint hearings entitled *Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy*, which focused in part on IPR policies. *See* FTC, Joint hearings of Federal Trade Commission and Department of Justice Antitrust Division (2002), *available at* http://www.ftc.gov/opp/intellect/. In July of 2004, the Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (2004), was signed into law, extending the coverage of the National Cooperative Research and Production Act of 1993, 15 U.S.C. §§ 4301-05 (1993), which provides a measure of immunity from antitrust sanctions, to SSOs.

In short, the Federal government has placed vital standards-based national interests in all areas of its activities almost entirely in the hands of the private sector standards development process, and has acted to encourage industry generally to rely on standards developed by the same organizations. It is therefore critical that the reasonable rules adopted by SSOs to manage their processes are given force and effect, and that those participants in SSO activities that are found to violate such rules are convincingly punished for their actions.

C. Government has Become Increasingly Dependent upon Private Sector Standards Development to Enable its Operations and Permit it to Achieve its Policy Objectives

The National Institute of Science and Technology (NIST) is required by the NTTAA and OBM Circular A-119 to report to Congress annually on the compliance of the Federal agencies with the requirements of the NTTAA. NIST has reported that through 2006 (the latest year for which information is publicly available), the Federal agencies had replaced at least 2,402 government unique standards with voluntary consensus standards, and referenced in excess of 20,000 non-government standards in procurement and regulatory documents. NIST also reported that in 2006, an all-time high of 4,075 Federal agency staff members actively participated in a total of 413 SSOs. Indeed, in 2006, the Federal agencies referenced 591 voluntary consensus standards for the first time, and promulgated only five new government unique standards, for a grand total of only 73 new, government unique standards over the preceding 10 years.

Moreover, since the passage of the NTTAA, both Congress and successive administrations have enacted and pursued an increasing number of high-level policy initiatives that can only be accomplished if a continuing stream of sophisticated ICT standards continue to be rapidly developed and widely deployed. That result cannot occur unless all

necessary patent claims under these standards are available on RAND, or less restrictive, terms. Those initiatives include:

E-Government: The Clinton and Bush Administrations and Congress have all recognized and supported the goal of making government more transparent and accessible to citizens through the use of Internet-based technologies. Similarly, they have realized the necessity and cost benefits of enabling the exchange of data within and across the Federal agencies. Each of these goals must rely heavily on the existence and uniform adoption of ICT standards. In 2002, Congress enacted the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (2002), the purposes of which include:

Relating to citizen-government interaction:

> (2) To promote use of the Internet and other information technologies to provide increased opportunities for citizen participation in Government....
> (9) To make the Federal Government more transparent and accountable....
> (11) To provide enhanced access to Government information and services in a manner consistent with laws regarding protection of personal privacy, national security, records, retention, access for persons with disabilities, and other relevant laws.

Relating to intra-governmental interaction:

> (5) To promote the use of the Internet and emerging technologies within and across Government agencies to provide citizen-centric Government information and services...
>
> (6) To reduce costs and burdens for businesses and other Government entities.
>
> (7) To promote better informed decisionmaking by policy makers.

Achieving these goals will require a government-wide ITC infrastructure that implements a myriad of Internet, browser, data format, accessibility, federated identity, privacy and security standards, many of which do not today exist.

In furtherance of these goals, the Clinton Administration created the Federal Chief Information Officers Council (CIO Council), which was later codified into law under the Bush Administration in the E-Government Act. That Act also requires maintenance and implementation across the Federal agencies of the standards-based Federal Enterprise Architecture (FEA), and directs the CIO Council to work with NIST and the Administrator of the Office of Electronic Government and Information Technology within the OMB to undertake a number of important activities to enable the interoperability goals of the FEA, including:

> ...to develop recommendations on information technology standards developed

under section 20 of the National Institute of Standards and Technology Act (15 U.S.C. 278g-3) and promulgated under Section 11331 of Title 40, and maximize the use of commercial standards as appropriate, including the following:

1. Standards and guidelines for interconnectivity and interoperability as described under section 3504

2. Consistent with the process under section 207(d) of the E-Government Act of 2002, standards and guidelines for categorizing federal government electronic information to enable efficient use of technologies, such as through the use of extensible markup language

3. Standards and guidelines for federal government computer system efficiency and security under section 301 of the E-Government Act of 2002

During the just completed presidential campaign, then-Senator Obama released a position paper making clear his intentions to build upon and advance this same agenda, promising to employ, "cutting edge technologies to...create a new level of transparency, accountability and participation for America's citizens." *Barack Obama on Innovation and Technology* (November 14, 2007), *available at* http://www.barackobama.com/pdf/issues/technology/

Fact_Sheet_Innovation_and_Technology.pdf. More specifically, the President Elect has promised to name the first government-wide Chief Technology Officer.

Healthcare: The goals of providing universal healthcare while decreasing the overall costs of providing healthcare for an aging population represents one of the greatest challenges facing government today. A recent RAND Corporation research summary concluded that, "If most hospitals and doctors' offices adopted HIT [health information technology], the potential efficiency savings for both inpatient and outpatient care could average over $77 billion per year," concluding:

> Widespread adoption of HIT and related technologies, applied correctly, could greatly improve health and healthcare in America while yielding significant savings....Government action is needed; without such action, it may be impossible to overcome market obstacles. Our findings strongly suggest that it is time for government and other payors to aggressively promote the adoption of effective Health Information Technology.

Health Information Technology, RAND Corporation (2005), *available at* http://www.rand.org/pubs/research_briefs/2005/RAND_RB9136.pdf

The government has taken up this promise and recognized the standards-based dependencies for achieving it. In 2005, the Department of Health and

Human Services launched a public-private partnership called the Health Information Technology Standards Panel (HITSP) to address these dependencies. HITSP currently operates 13 working groups, each tasked with the creation of a standard needed to enable the health information technology goals of its public and private sponsors. HITSP Web Site, *available at* http://www.hitsp.org/default.aspx.

The above represent only two examples of the many areas of government policy in which standards will play an increasingly vital role. Others include addressing climate change, bringing next generation Internet access to all Americans, enabling first responders to communicate with each other, addressing homeland security threats, and much more. In each case, government will be dependent, both by law and in fact, on the viability of private sector standard setting to achieve its goals.

II. Standards Development Organizations Adopt, and Must Trust Members to Obey, Rules that Require Disclosure of Relevant Patent Claims

A. SSOs Adopt IPR Policies to Protect Members, Non-Members and the Marketplace

While legally the *Rambus* case involves a dispute involving patent rights, the more fundamental question is whether the conduct that the FTC found Rambus to have engaged in defeated the goals of the JEDEC's IPR Policy and violated the

reasonable expectations of JEDEC's members, and if so, how such conduct can be avoided in the future.

Hundreds of United States SSOs today maintain thousands of standards relating to diverse technologies. For a partial list, *see* ConsortiumInfo.org, *Consortium and Standards List* (2008), *available at* http://www.consortiuminfo.org /ssl/links.php?cat=1. At the heart of the processes of these SSOs lie IPR policies. While those policies vary in their terms, each seeks to avoid disputes similar to those that arose in *Rambus*. If the cost of participation in standard setting activities becomes too great, current SSO participants (and particularly the largest United States technology companies, some of which are members of over 300 SSOs, and own the largest patent portfolios) may choose to participate in far fewer SSOs. Andrew Updegrove, *Survey: Major Standards Players Tell How They Evaluate Standard Setting Organizations,* Consortium Standards Bulletin (Jun. 2003), *available at* http://www.consortiuminfo.org/ bulletins/jun03.php#featured. The result would be standards developed by fewer participants. Historically, such standards have been less likely to be broadly adopted, because they are suspected of being more proprietary and less technically effective. Needless to say, a proposed standard that is not broadly adopted has failed in its essential purpose.

For standard setting to be successful, SSOs need to employ policies that will minimize the probability of releasing a standard subject to the necessary claims of others. *Amici curiae* and other SSOs have adopted IPR policies that vary in their

specifics. *See* Lemley, *supra,* at 1904-06, 1973-75 (summarizing the results of a survey of the intellectual property policies of 43 standard-setting organizations), and ConsortiumInfo.org, *Consortium and Standards List* (2008), *available at* http://www.consortiuminfo.org /ssl/links.php?cat=1 (providing links to the IPR policies of scores of SSOs). But most such IPR policies either (i) require disclosure of IPR during the standardization process, or (ii) impose other requirements that make disclosure unnecessary (such as requiring all members to pre-commit to granting a royalty-free license to any necessary claims owned by them). See, for example, the IPR policy of the World Wide Web Consortium. W3C, *W3C Patent Policy* (May 20, 2003), *available at* http: //www.w3.org/Consortium/Patent-Policy-20030520. html.

Despite the best efforts of SSOs to deal with IPR issues, there have been many disputes with members involving IPR rights, some of which have reached the courts or been the subject of administrative actions brought by the FTC. *See, e.g., In the Matter of Dell Computer Corp.*, 121 F.T.C. 616, 1996 FTC LEXIS 291, Docket No. C-3658 (May 20, 1996) (Consent Order) and *Stambler v. Diebold, Inc.*, 11 U.S.P.Q.2d 1709 (E.D.N.Y. 1988), each of which involved behavior similar to *Rambus.* In the former, Dell entered into a consent decree obligating it to provide royalty free licenses to all; in the latter, where the patent owner waited ten years before asserting its patent claims, the Court applied the doctrine of laches to bar enforcement of those claims. Such disputes will certainly become more frequent

as the complexity of technology increases, and will particularly act to the detriment of companies with few patents that cannot resolve disputes outside of the courts by bartering patent licenses back and forth. As noted by Carl Cargill, then the Director of Standards for Sun Microsystems (itself a member of over 100 SSOs):

> In [building a mobile] telephone, there are 137 essential patents. The ability of a small company to enter this market is limited if they have no large patent portfolio from which to deal. At the same time, Tim Berners-Lee of the W3C [World Wide Web Consortium] has estimated that every time someone clicks a mouse in a web application, thirty patents are invoked. Again, if a small company does not have a significant patent portfolio with which to deal, they are at the mercy of the patent holders who own essential patents in the standards.

Carl F. Cargill, *The* Sisyphus *Agenda: Standardization as a Guardian of Innovation*, 14-15 (Jan. 27, 2003), *available at* www.si.umich.edu/~kahin/hawk/htdocs/cargillpaper.doc.

Even among large companies, all may not be well. As noted by *The Economist,* predicting the *Rambus* tempest with uncanny accuracy at the very time that the events at issue were occurring, "[T]he noisiest of ...competitive battles (between suppliers) will be about standards....[I]n the computer industry, new standards can be the source of

enormous wealth, or the death of corporate empires. With so much at stake, standards arouse violent passions." *Do It My Way*, The Economist, Feb. 27, 1993, at 11. The technology world has made huge strides since this article was written -- today, truly open standards pervade the technology marketplace. But if the integrity of the standard setting process is not upheld, then there is great danger that technology companies will revert to the types of battles to impose proprietary standards described in this article.

B. Absent a Justifiable Presumption of Trust, Stakeholders have More to Lose than to Gain by Participating in Standards Development

Particularly in the area of technology, where standards are essential to allow systems to be assembled out of the products of multiple vendors and to communicate via the Internet, SSOs provide their members with the potential for the rapid development and commercial launch of new products and services. Yet these groups are voluntary, consensus-based organizations. They function under a complex, fragile "honor" system, guided by common principles of collaboration and collective benefit.

Participants in SSOs pay (often substantially, in the case of upper level memberships in many consortia) for the privilege of creating standards. If industry, academia and government representatives did not participate in SSOs, the result would be a world in which only proprietary, so-called "de facto"

standards (such as the Microsoft Windows operating system) could emerge, after much delay, uncertainty and cost, and with attendant limitation on long-term innovation, price competition and business and private consumer choices.

Tens of thousands of members of SSOs participate in the development of standards. At the heart of the decision of each such member to join a standard setting body is the expectation that the benefits from participation will exceed the risks and costs. Factors that make participation seem more burdensome and less beneficial – such as the risk of patent ambush - discourage participation, with attendant damage to the best interests of consumers and national competitiveness. *Amici curiae* believe that any failure to punish patent ambush will not only undermine the voluntary consensus standards development process, but encourage destructive behavior by additional participants as well.

Allowing an SSO member to violate this system with impunity, as the Commissioners of the FTC unanimously concluded Rambus set out to do, presents a threat to the very concept of voluntary participation. Those that voluntarily participated in the JEDEC working group that developed the standards underlying the patent claims at issue unknowingly helped create (and then walked into) an extremely expensive trap. If such cynical acts go unredressed by the courts, similarly situated technology companies are likely to conclude that it is ultimately safer to revert to the vastly less preferable (and recent) practice of developing proprietary products and services whenever

possible.[2] The result would be protracted and expensive standards wars, less rapid innovation, less transparency in government, and the thwarting of the policy goals of government.

C. SSOs are not Able to Enforce their IPR Policies Effectively, and Must Therefore be Able to Rely upon the Courts and Regulators to Enforce Policy Obligations

Patent litigation is notoriously expensive, in part due to the subjectivity involved in evaluating the validity of a patent claim, and then in determining whether that claim has in fact been infringed. The cost of litigating a patent dispute involving standards is even greater, as it involves additional subjective judgments. For example, IPR policies seek to strike a fair balance between the rights of patent holders with those of implementers, asking the former for no more than is necessary for the common good of implementers and consumers.

As a result, only necessary claims (often described as patent claims that would be "unavoidably infringed by a compliant

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[2] The classic example is the commercial war which raged between two competing, patented, video designs: JVC's VHS format and Sony's Betamax format. This failure by industry to agree on a common standard ultimately left millions of consumers with Betamax video players for which new videotapes could not be rented after the VHS format achieved supremacy. *See* ConsortiumInfo.org, *What (and Why) is an SSO?* (2003), *available at* http://www.consortiuminfo.org/essentialguide/whatisansso.php.

implementation of the standard") must typically be licensed on RAND terms. But what if the single alternative way of implementing the standard would be unreasonably expensive, or far less technically effective? Similarly, the question of which license terms can, and cannot, be rightly characterized as "reasonable and non-discriminatory" has increasingly been the subject of litigation. *See, e.g.*, *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007).

SSOs, and especially consortia, do not have large budgets. As a result, they are not capable of funding patent searches in relation to each standard that they adopt, nor can they afford, except rarely, to obtain opinions of patent counsel when disputes arise. And, in any event, such searches and opinion would not be binding upon the litigants themselves, or of more than informational value to a judge or jury.

Due to the high costs of patent litigation, the unexpected assertion of necessary claims against implementers of a standard can be very disruptive to the adoption of a standard, especially when the owner of the claim is unwilling to license such claims to all on RAND terms, or at all. At best, such a situation can add additional costs of uptake that may slow adoption and raise costs to consumers. At worst, it can thwart the success of the standard entirely.

The integrity and success of voluntary SSOs requires that the courts be willing, and regulators able, to enforce SSO IPR policies when they have

been violated. If SSOs must fear that courts will not uphold IPR policies after the fact, needless uncertainty is created over members' disclosure obligations in practice. Such uncertainty may make members question whether SSO participation is worthwhile at all.

As a result, the vital process of standards development must be able to rely on the courts to enforce both the intent as well as the word of IPR policy rules, and validate the trust of those that engage in the voluntary process of standards development. In particular, those that develop standards need to rely upon the courts to sustain the judgments of regulators when they step in to redress conduct they believe to be deceptive, because only the regulatory agencies can effectively protect small vendors and consumers from the bad acts of those that violate IPR policy rules.

CONCLUSION

Due to the profound and pervasive adverse effects anticipated from the Circuit Court's decision; *amici curiae* respectfully request that this Court grant *certiorari*.

Respectfully submitted,

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